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UNITED MALAYA STORES SDN BHD v. S SELAPA SIVALINGAM & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
LIZA CHAN SOW KENG JC
[ORIGINATING SUMMONS NO: WA-24NCC-10-01-2022]
14 MAY 2022

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Abstract – *The statutory notice issued by the proprietors/creditors against the company to demand payment of an outstanding sum was deemed valid and effective as it was done in writing under the hands of the creditors' solicitors, had specified the sum due and was served at the company's registered office, thereby complying with s. 466(1)(a) of the Companies Act 2016. The company's claim of irreparable damage, fears and hardship could not override the proprietors' statutory right as a creditor to enforce the debt owed, much less constitute any real ground for a Fortuna injunction.*

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CIVIL PROCEDURE: *Injunction – Fortuna injunction – Restraining proprietors of premises from presenting winding-up petition against company – Company's failure to pay rental to proprietors – Whether there was mutual understanding of reduction of monthly rentals – Whether proprietors as creditors had locus standi and statutory right to petition – Whether notice issued by proprietors pursuant to s. 466 of Companies Act 2016 valid – Whether there was bona fide dispute of debt justifying Fortuna injunction – Whether court exercised discretion to also refuse Erinford injunction*

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This originating summons ('OS') was filed by the plaintiff against the defendants for a *Fortuna* injunction to restrain the defendants from presenting a winding-up petition against the plaintiff and for a declaration that the notice issued by the defendants pursuant to a s. 466 of the Companies Act 2016 ('CA') for RM1,120,000 was null and void. The defendants were the registered proprietors of two units of five-storey lots ('premises') while the plaintiff was the tenant of the premises pursuant to a tenancy agreement ('TA'). The defendants had indulged the plaintiff's requests contained in various correspondences to pay RM110,000 per month as rental contrary to the rental amount stipulated in the TA. The defendants acceded to rentals of RM100,000 per month for the months of May and June 2020 but amongst others, made clear that the full rental of RM120,000 was to be paid from July 2020. The defendants expressly informed the plaintiff that from January 2021 onwards, the plaintiff was to pay the agreed rental without any deduction and the defendants also demanded for a sum of RM150,000 being the shortfall in rentals payable by the plaintiff to the defendants from July 2020 till February 2021. The plaintiff, in response, (i) denied it owed an outstanding sum of RM150,000 to the defendants; (ii) alleged that pursuant to a mutual understanding agreed in or about the month of April 2020, the

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defendants had agreed that the monthly rental from May 2020 to July 2020 will be reduced to RM100,000; and (iii) alleged that pursuant to a mutual understanding agreed in or about the month of July 2020, the defendants agreed to maintain the monthly rental at RM110,000 from November 2020 to November 2021. The defendants refuted the plaintiff's assertions and demanded for a total sum of RM190,000 as outstanding rental sum, including the shortfall in rentals paid as at March 2021. The defendants also again demanded for the outstanding RM190,000, accepted the payment of April rental of RM80,000 from the plaintiff without prejudice to the defendant's rights under the TA and made clear all short payments made by the plaintiff shall be taken on account of outstanding arrears. From January 2021 till April 2021, the plaintiff paid only a sum of RM80,000 per month as rental and as at date of disposal of the OS, no rental at all was paid from May 2021 onwards. The defendants filed a suit ('Suit 548') against the plaintiff for outstanding rentals and issued a statutory notice of demand pursuant to s. 465(1) and s. 466 of the CA ('notice') to demand payment of the outstanding sum of RM1,120,000 payable to the defendant under the TA agreement. The plaintiff disputed the alleged debt and demanded an undertaking from the defendants to be furnished within three days not to proceed with the filing and presentation of any winding-up petition. The undertaking was not forthcoming and hence, the present OS. The plaintiff contended that there was a *prima facie bona fide* dispute of debt on substantial grounds based on the following, *inter alia*, (i) due to the onset of the Covid-19 pandemic, the plaintiff had sought to renegotiate the terms of the TA; (ii) part of the sum was the subject matter of Suit 548; which was withdrawn by the defendants; this withdrawal was telling in that the debt was *bona fide* disputed; (iii) the sum did not take into account the fact that by a mutual understanding between the parties, the defendants would give a reduction of monthly rentals of RM10,000 *en bloc* every six months; (iv) the plaintiff was a going concern, was solvent and had, at all material times, set apart sufficient balance to make payments to the defendants; (v) if the defendants were not restrained by an injunction, the defendants' winding-up action against the plaintiff would cause severe irreparable damage to the plaintiff; (vi) the winding-up petition was clearly an abuse of court process; the dominant purpose of the notice was merely to exert undue pressure on the plaintiff to pay a sum which was disputed on substantial grounds; and (vii) the notice was a backdoor attempt at circumventing s. 7 of the Covid-19 Act which barred the defendant from exercising their rights under the TA. The issues before this court were (i) whether the s. 466 statutory notice was valid; and (ii) whether there was a *bona fide* dispute of the debt justifying the *Fortuna* injunction.

Held (dismissing originating summons):

(1) The statutory notice was issued in writing under the hands of the solicitors for the defendants, specified the amount of RM1,120,000 due and served at the registered office of the plaintiff as evidence from the

company search. As such, the notice had complied with s. 466(1)(a) and was valid and effective as it had satisfied the three requirements laid out by the Federal Court in *Lai Yak Kee v. Pembinaan Cemerlang Sdn Bhd* which were (i) the demand must be in writing under the hand of the creditor or his authorised agent; (ii) it must specify the sum due; and (iii) the demand must be served on the company by leaving it at its registered office. (para 23)

(2) The mutual understanding asserted by the plaintiff was inherently improbable and totally inconsistent with the undisputed terms of the TA in cl. 10 which provides for any variation to be in writing. The rent for the applicable period was RM120,000 per month. The contemporaneous documents and undisputed facts in relation to the agreed rental underscored the inherent implausibility of the plaintiff's bare contentions. Parties are bound by the terms of the contract they have entered into and it is axiomatic that the duty of the court is to give effect to the clear intention of the parties as expressed in cl. 10, which was in clear and unambiguous language. Any agreed reduction in rental were indeed in the past, expressly agreed by the defendants in writing. This court did not find on the material before it anything at all that would admit of such mutual understanding as posited by the plaintiff. The plaintiff in attempting to unilaterally foist the 'mutual understanding' on the defendants to justify a reduction of rentals and pay rent at RM80,000 a month from January 2021 was akin to the plaintiff attempting to re-write the terms of the TA. This court was entitled to reject the plaintiff's assertion that there was such mutual understanding. They were mere averments which were not substantiated by any cogent evidence, and thus, were not based on substantive grounds. (paras 27-29)

(3) The Covid-19 pandemic did not excuse the plaintiff from not paying any rent at all from May 2021. The plaintiff had not shown satisfactorily that it was unable to perform its contractual obligations under the TA; and that such inability was due to the measures prescribed, made or taken under the Prevention and Control of Infectious Diseases Act 1988 to control or prevent the spread of Covid-19. The plaintiff was not affected due to the measures implemented by the Government as department/convenience stores being an essential service and goods provider were allowed to open. The plaintiff's own financial statement of comprehensive income showed that for the financial year end 2020, revenue and gross profit had improved in 2020 as compared to 2019. Even though the plaintiff had affirmed on oath that it was willing to pay rental at RM80,000 a month from May to December 2021, yet it did not pay a cent up to the date of this court's decision; the inequitable conduct of the plaintiff was all the more egregious particularly when the plaintiff had submitted that it had 'set apart sufficient balance to make payments to the defendants.' Refusal to pay does not equate to inability

to pay, pure and simple. As such, the plaintiff could not willy-nilly avail itself of s. 7 of the Covid-19 Act not to pay rental as s. 7 does not confer a moratorium on the plaintiff's obligations to pay rent. (para 30)

(4) Even if the plaintiff was solvent as alleged, its refusal to pay, could not give it any basis or right to a *Fortuna* injunction. Solvency does not give one *carte blanche* to refuse to pay legitimate debts. The test of commercial solvency requires immediate availability of assets to pay current liabilities when they fall due. The solvency of a company will count for nothing if it persists in non-payment or that it is nevertheless not ready, willing and able to meet the demands of the petitioning creditor. Mere disagreement on the quantum of indebtedness could not deny the defendants' statutory right as a creditor to present a petition. Even taking the plaintiff's case at the highest that rent per month was RM80,000, a single month's rent owed would put the debt above the statutory minimum under s. 466(1)(a); let alone the stark fact that the plaintiff had not paid rent since May 2021. (paras 33 & 34)

(5) The defendants could be described as 'creditors' and being unpaid creditors, they have both *locus standi* and a statutory right to petition, and the petition was not bound to fail as the failure to pay within the stipulated period of 21 days gave rise to the presumption that the plaintiff was unable to pay its debts. The intended winding-up petition could not be described properly as an abuse of the process of the court, even based on the plaintiff's self-reckoning of RM80,000 a month's rent (assuming this had any basis at all), as it was only the quantum of the debt that was in dispute. The plaintiff's claim of irreparable damage, fears and hardship could not override the defendant's statutory right as a creditor to enforce the debt owed, much less constitute any real ground for a *Fortuna* injunction. (paras 35-37)

(6) The plaintiff had not satisfied the court on a balance of probabilities that the defendants' intended petition had no chance of success, as a matter of law as well as a matter of fact; and that the presentation of such petition (which had no chance of success) might produce irreparable damage to the plaintiff. The plaintiff had not satisfied the two principles laid down in *Fortuna Holdings Pty Ltd v. The Deputy Commissioner of Taxation of the Commonwealth of Australia* to warrant a grant of an injunction to prevent the defendants from presenting a winding-up petition against the plaintiff. There was thus no merit in the plaintiff's application. (paras 38 & 39)

(7) Enclosure 33 was the plaintiff's application for an *Erinford* injunction to restrain the defendants from filing, presenting a winding-up petition and taking further steps in the winding-up petition pending the hearing of the plaintiff's appeal to the Court of Appeal against the decision made by this court. The application was predicated on similar grounds as advanced for the *Fortuna* injunction. The application for an *Erinford*

injunction was bereft of merit for the same reasons why the *Fortuna* injunction application was dismissed. Considering all the circumstances, the more appropriate course would be for the plaintiff to apply to the winding-up court for a stay or to strike out the proceedings for abuse of process since the plaintiff was of the adamant view that the debt was *bona fide* disputed. The *Erinford* injunction was not necessary when suitable statutory remedy was available, pursuant to s. 469 of the CA. Having found earlier that the matter had been rendered academic, this court saw no useful purpose to grant an *Erinford* injunction that was of no utility. As such, the question of nugatoriness of the appeal, balance of convenience and damages not being an adequate remedy posited by the plaintiff did not arise for consideration at all. The balance of convenience was in favour of the defendants, for if the *Erinford* injunction was allowed, the defendants would be hindered from pursuing their lawful statutory rights as a creditor of the plaintiff. As such, this court exercised its discretion to refuse the *Erinford* injunction application. (paras 45 & 46)

Case(s) referred to:

American Cynamid Co v. Ethicon Ltd [1975] AC 396 ***(refd)***
Azman & Tay Associates Sdn Bhd v. Sentul Raya Sdn Bhd [2002] 4 CLJ 391 HC ***(refd)***
Dato' Sivananthan Shanmugam v. Artisan Fokus Sdn Bhd [2015] 2 CLJ 1062 CA ***(refd)***
David Wong Hon Leong v. Noorazman Adnan [1995] 4 CLJ 155 CA ***(refd)***
Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd [2015] 2 CLJ 453 FC ***(refd)***
Fortuna Holdings Pty Ltd v. The Deputy Commissioner of Taxation of the Commonwealth of Australia [1978] VR 83 ***(refd)***
Jaks Sdn Bhd v. Zeta Letrik Sdn Bhd [2021] 1 LNS 1505 HC ***(refd)***
Klass Corporation (M) Sdn Bhd v. MKRS Management Sdn Bhd [2018] 7 CLJ 303 HC ***(refd)***
Lafarge Concrete (Malaysia) Sdn Bhd v. Gold Trend Builders Sdn Bhd [2011] 1 LNS 1763 CA ***(refd)***
Lai Yak Kee v. Pembinaan Alam Cemerlang Sdn Bhd [2012] 1 LNS 1464 FC ***(refd)***
Lori Malaysia Bhd v. Arab-Malaysian Finance Bhd [1999] 2 CLJ 997 FC ***(refd)***
Maju Holdings Sdn Bhd v. Spring Energy Sdn Bhd [2020] 1 LNS 1332 HC ***(dist)***
Malaysia Air Charter Company Sdn Bhd v. Petronas Dagangan Sdn Bhd [2000] 4 CLJ 437 FC ***(refd)***
Maril-Rionebel (M) Sdn Bhd & Anor v. Perdana Merchant Bankers Bhd & Other Appeals [2001] 3 CLJ 248 CA ***(refd)***
Megasteel Sdn Bhd v. Perwaja Steel Sdn Bhd [2008] 4 CLJ 352 CA ***(refd)***
Michael C Solle v. United Malayan Banking Corp Bhd [1984] 1 CLJ 151; [1984] 1 CLJ (Rep) 267 FC ***(refd)***
Ming Ann Holdings Sdn Bhd v. Danaharta Urus Sdn Bhd [2002] 3 CLJ 380 CA ***(refd)***
Mobikom Sdn Bhd v. Inmiss Communications Sdn Bhd [2007] 3 CLJ 295 CA ***(foll)***
Multimedia Development Corp Sdn Bhd v. Pembinaan Purcon Sdn Bhd [2006] 2 MLJ 653 ***(refd)***
Pacific & Orient Insurance Co Bhd v. Muniammah Muniandy [2011] 1 CLJ 947 CA ***(refd)***
Pengkalen Holiday Resort Sdn Bhd v. Perbadanan Pengurusan Paradise Lagoon Apartment (North) & Anor [2016] 1 LNS 1114 HC ***(refd)***
People Realty Sdn Bhd v. Red Rock Construction Sdn Bhd [2008] 1 CLJ 632 CA ***(refd)***
Setapak Heights Development Sdn Bhd v. Tekno Kota Sdn Bhd [2006] 2 CLJ 337 CA ***(refd)***

Subashini Rajasingam v. Saravanan Thangathoray & Other Appeals [2008] 2 CLJ 1 FC ***(refd)***
Syarikat Mohd Noor Yusof Sdn Bhd v. Polibina Engineering Enterprise Sdn Bhd [2005] 2 CLJ 676 CA ***(refd)***
Tan Kok Tong v. Hoe Hong Trading Co Sdn Bhd [2007] 2 CLJ 305 CA ***(refd)***
Tindok Besar Estate Sdn Bhd v. Tinjar Co [1979] 1 LNS 119 FC ***(refd)***
Volkswagen Group Malaysia Sdn Bhd v. Loo Chay Meng [2016] 10 CLJ 748 HC ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 218(2)(a), 221
Companies Act 2016, ss. 465(1), 466(1)(a), 469
Temporary Measures For Reducing The Impact Of Coronavirus Disease 2019 (Covid-19) Act 2020, ss. 7, 9

For the plaintiff - Bahari Yeow & Alex Choo; M/s Gan Partnership
For the defendants - R Thayalan & Ambi Balakrishnan; M/s R Thayalan & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Liza Chan Sow Keng JC:

Introduction

[1] This originating summons ("OS") was filed on 6 January 2022 by the plaintiff against the defendants for a *Fortuna* injunction to restrain the defendants from presenting a winding-up petition against the plaintiff and for a declaration that the notice dated 16 December 2021 issued by the defendants pursuant to a s. 466 of the Companies Act 2016 ("CA 2016") for RM1,120,000 is null and void.

[2] On 14 January 2022, I had granted an *ad interim* injunction restraining the defendants from presenting a winding-up petition against the plaintiff pending *inter partes* hearing of encl. 3 which sought similar relief as the OS.

[3] Both the OS and encl. 3 were fixed for hearing together. I had dismissed the OS with costs to the defendants on 25 March 2022 and given broad reasons for my decision. Enclosure 3 was struck off as it was rendered academic. This judgment contains the full reasons for my decision.

[4] The plaintiff has appealed to the Court of Appeal against the dismissal of the OS and filed encl. 33 for an *Erinford* injunction to restrain the defendants from presenting a winding-up petition against the plaintiff pending disposal of the plaintiff's appeal to the Court of Appeal. I have dismissed the *Erinford* injunction on 13 May 2022. As the matters were related, it is convenient to deal with the dismissal of the OS, both encl. 3 and encl. 33 in one judgment.

Background

[5] The defendants ("landlord") are the registered proprietors of two units of five-storey lots at Jalan Tun Sambanthan, 50470 Kuala Lumpur ("the premises").

[6] The plaintiff is the tenant of the premises pursuant to a tenancy agreement dated 23 September 2015 ("the TA") for a period of three years from 1 October 2015 till 30 September 2018 with automatic renewals of three terms of three years each on *inter alia* the following conditions:

(i) the rental payment for the first term was agreed at (s. 5 of Schedule to TA):

(a) first year (1 October 2015 to 30 September 2016) – RM100,000 per month;

(b) second year (1 October 2016 to 30 September 2017) – RM110,000 per month; and

(c) third year (1 October 2017 to 30 September 2018) – RM115,000 per month.

(ii) second term rentals (s. 8 of Schedule to TA):

(a) first year (1 October 2018 to 30 September 2019) – RM120,000 per month;

(b) second year (1 October 2019 to 30 September 2020) – RM120,000 per month; and

(c) third year (1 October 2020 to 30 September 2021) – RM120,000 per month.

(iii) third term rentals:

(a) first year (1 January 2021 to 30 September 2022) – RM120,000 per month;

(b) second year (1 October 2022 to 30 September 2023) – RM120,000 per month; and

(c) third year (1 October 2023 to 30 September 2024) – RM130,000 per month.

(vi) fourth term rentals:

(a) first year (1 October 2024 to 30 September 2025) – RM130,000 per month;

(b) second year (1 October 2025 to 30 September 2026) – RM130,000 per month; and

(c) third year (1 October 2026 to 30 September 2027) – RM130,000 per month.

(v) monthly rentals are to be paid on or before the seventh day of each month - cl. 2, TA;

(vi) rental in arrears not made within 14 days after a formal demand was issued by the defendants, will amount to a breach of the TA by the plaintiff, entitling the defendants to terminate the TA – cl. 7, TA; and

(vii) the terms of the TA are not to be amended, altered, changed or otherwise modified unless with the mutual consent of the parties and such amendments, alterations, changes and modifications shall be made in writing and signed by the parties – cl. 10, TA.

[7] The defendants had indulged the plaintiff's requests contained in various correspondences to pay RM110,000 per month as rental contrary to the rental amount stipulated in the TA for the period from November 2017 to October 2018; November 2018 to April 2019; May 2019 to October 2019; and November 2019 to April 2020. By the defendants' former solicitor's letter dated 19 May 2020 (exh. P-7), the defendants acceded to rentals of RM100,000 per month for the months of May and June 2020 but amongst others, made clear that the full rental of RM120,000 is to be paid from July 2020.

[8] By an undated letter from the defendants' former solicitors to the plaintiff (exh. P-11, which was obviously issued after February 2021 as it included the shortfall for February 2021 rental), the defendants expressly informed the plaintiff that from January 2021 onwards, the plaintiff is to pay the agreed rental without any deduction and the defendants also demanded for a sum of RM150,000 being the shortfall in rentals payable by the plaintiff to the defendants from July 2020 till February 2021.

[9] By letter dated 26 March 2021 (exh. P-12), the plaintiff in response:

(i) denied that the plaintiff owes an outstanding sum of RM150,000 to the defendants;

(ii) alleged that pursuant to a mutual understanding agreed in or about the month of April 2020, the defendants have agreed that the monthly rental from May 2020 to July 2020 will be reduced to RM100,000; and

(iii) alleged that pursuant to a mutual understanding agreed in or about the month of July 2020, the defendants agreed to maintain the monthly rental at RM110,000 from November 2020 to November 2021.

[10] The defendants refuted the plaintiff's assertions by letter dated 12 April 2021 and demanded for a total sum of RM190,00 as outstanding rental sum, including the shortfall in rentals paid as at March 2021 and by another letter dated 10 May 2021 to the plaintiff's solicitors:

(i) again demanded for the outstanding sum of RM190,000;

(ii) accepted the payment of April rental of RM80,000 from the plaintiff without prejudice to the defendants' rights under the TA; and

(iii) made clear all short payments made by the plaintiff shall be taken on account of outstanding arrears.

[11] It is undisputed that from January 2021 till April 2021, the plaintiff paid only a sum of RM80,000 per month as rental, and as at date of disposal of the OS, no rental at all was paid from May 2021 onwards.

[12] On 15 July 2021, the defendants filed Kuala Lumpur High Court Suit No. WA-22NCvC-548-08-2021 ("suit 548") against the plaintiff for outstanding rentals. The plaintiff tenant filed its defence dated 1 September 2021 and a striking out application.

[13] The defendants through their solicitors issued a statutory notice of demand dated 16 December 2021 pursuant to s. 465(1) and s. 466 CA 2016 ("notice") to demand payment of the outstanding sum of RM1,120,000 payable to the defendants ("alleged debt") under the TA agreement.

[14] The plaintiff by letter dated 30 December 2021 disputed the alleged debt and demanded an undertaking from the defendants to be furnished within three days not to proceed with the filing and presentation of any winding-up petition. The undertaking was not forthcoming and hence the present OS.

The Plaintiff's Case

[15] The plaintiff contended that there is a *prima facie bona fide* dispute of debt on substantial grounds based on the following:

(i) the sum stipulated in the notice is not a judgment sum;

(ii) due to the onset of the COVID-19 pandemic, the plaintiff has sought to renegotiate the terms of the tenancy agreement;

(iii) part of the sum was the subject matter of suit 548; which was withdrawn by the defendants; this withdrawal is telling in that the debt is *bona fide* disputed;

(iv) the sum did not take into account the fact that by convention, agreement and/or mutual understanding between UMSSB and the defendants, the defendants will give a reduction of monthly rentals of RM10,000 *en bloc* every six months;

(v) the plaintiff is a going concern, is solvent and has, at all material times, set apart sufficient balance to make payments to the defendants;

(vi) if the defendants are not restrained by an injunction, the defendants' winding-up action against the plaintiff would cause severe irreparable damage to the plaintiff which has approximately 35 employees, all of whom may be financially and/or personally jeopardised; there will be default and/or cross-defaults in its loan facilities and contracts; in the event of a facility recall by financiers or freezing of accounts, business investments and the business developments of the plaintiff will be adversely affected; its credit, credibility, goodwill and reputation will be destroyed, seriously damaged and/or prejudiced;

(vii) the winding-up petition is clearly an abuse of court process; the dominant purpose of the notice is merely to exert undue pressure on the plaintiff to pay a sum which is disputed on substantial grounds

citing *Multimedia Development Corp Sdn Bhd v. Pembinaan Purcon Sdn Bhd* [2006] 2 MLJ 653, p. 677, para. 46 @ p. 98 that if the sole or predominant purpose of the intended winding-up is for a mere collection of debt or simply to bring pressure to bear or to force the company to negotiate with the creditor would be abusing the process of the court for which an injunction would lie to prevent the creditor from exercising such right;

(viii) the notice is a backdoor attempt at circumventing s. 7 of the Temporary Measures For Reducing The Impact Of Coronavirus Disease 2019 (Covid-19) Act 2020 (COVID-19 Act) which bars the defendants from exercising their rights under the tenancy agreement. Section 9 of the COVID-19 Act provides:

> (1) Any dispute in respect of any inability of any party or parties to perform any contractual obligation arising from any contract due to the measures prescribed, made or taken under the Prevention and Control of Infectious Diseases Act 1988 to control or prevent the spread of COVID-19 may be settled by way of mediation.

Defendants' Contentions

[16] The defendants in resisting the *Fortuna* injunction application postulated that:

(i) on 9 November 2021, suit 548 was withdrawn with liberty to file afresh, and with no order as to costs. The merits of suit 548 were not decided and it is baseless for the plaintiff to assume that the suit 548 was withdrawn by the defendants due to any dispute as to the amount;

(ii) there was no mutual understanding and/or agreement exist between the parties that the defendants will grant rental reduction for an *en bloc* period of six months as a normal course of business;

(iii) that the defendants have only allowed for any rental reduction for the premises expressly; that there is no implied understanding and/or agreement by the defendants is evident from the correspondences:

(a) if the said mutual understanding exist, there would be no necessity for the plaintiff to issue its letter dated 28 December 2020 to the defendants to seek the defendants' consideration to reduce the rental sum from January 2021 onwards and further proposed to revise the TA altogether, allegedly due to the plaintiff's change of shareholders at the material time;

(b) the mutual understanding raised in the plaintiff's letter dated 26 March 2021 was categorically denied by the defendants' letters dated 12 April 2021 and 10 May 2021 which also demanded for the total sum due and payable by the plaintiff under the TA, the plaintiff did not refute the same;

(c) no mutual understanding exists at any material time which could allow the plaintiff to pay the sum of RM80,000 per month as rental payment for the premises from January 2021 onwards;

(d) the plaintiff's proposal for rental of RM70,000 per month for the premises in its letter dated 28 December 2020 was expressly rejected by the defendants' letter dated 16 February 2021; instead the defendants had informed the plaintiff that they will not consider any reduction in rental for the premises and requested the plaintiff to pay the full rental of RM120,000 per month; the plaintiff however made payment of RM80,000 a month from January 2021 to March 2021 and subsequently RM80,000 from April, May 2021, and paid nothing after that.

(iv) the defendants' letters dated 12 April 2021 and 10 May 2021 demanded for the shortfall in rental payment; the 10 May 2021 letter made clear that the monthly rental paid of RM80,000 was accepted without prejudice to the defendants' rights under the TA. The defendants' position stated in these letters were not answered or refuted by the plaintiff;

(v) there is no *bona fide* dispute of the debt;

(vi) section 7 of the COVID-19 Act does not apply to the plaintiff which carries out business as a department store and categorised as an essential service provider; the plaintiff's own financial statements in fact show that the plaintiff generated a higher revenue collection with reduced loss suffered in the year 2020 compared to 2019;

(vii) despite the plaintiff having averred on oath that it is prepared to pay a sum of RM80,000 per month to the defendants from May 2021 to December 2021, no payments were made; and

(viii) the defendants are entitled to issue the notice for the debt.

Law And Decision Of The Court

[17] The legal principles that warrant the grant of a *Fortuna* injunction are well settled as elucidated in the following cases:

(i) *Fortuna Holdings Pty Ltd v. The Deputy Commissioner of Taxation of the Commonwealth of Australia* [1978] VR 83:

> The decisions of the courts have established the principle that the presentation of a winding-up petition may be restrained by injunction where its presentation would amount to an abuse of the process of the court. The courts apply this principle similarly to restrain the advertisement of a petition already presented. The principle enables companies to be protected from threatened or apprehended oppression and damage from abuse of court process.

> The basis on which the courts have intervened in the cases cited by counsel, has been that presentation of a winding-up petition might of itself cause irreparable damage to the company. Given that basis, the application of the principle which entitles the courts to intervene to prevent abuse of process, depends on the existence of different elements in two distinct situations considered in the authorities. For convenience I will refer to the applications of the principle in the two situations as the first and second branches of the principle.
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> **First branch of principle**
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> The first branch applies in cases where the presentation of the petition might produce irreparable damage to the company and where the proposed petition has no chance of success ...
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> **Second branch of principle**
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> The second branch applies in cases where a petitioner proposing to present a petition has chosen to assert a disputed claim, by a procedure which might produce irreparable damage to the company, rather than by a suitable alternative procedure. It may apply in cases where the petition, if presented, has a chance of success. In some cases both the first and the second branches of the principle apply.

(ii) *Mobikom Sdn Bhd v. Inmiss Communications Sdn Bhd* [2007] 3 CLJ 295; [2007] 3 MLJ 316, Gopal Sri Ram JCA (later FCJ) explained the basis as follows:

> [5] The kind of injunction by which an intended winding-up petition is sought to be restrained is known as a '*Fortuna* injunction' taking its name from the case in which the juridical basis for the relief was first explained. See, *Fortuna Holdings Ptv Ltd v. The Deputy Commissioner of Taxation* (1978) VR 83. In that case, McGarvie J discussed the basis on which a court acts to restrain the presentation of a winding-up petition and the two branches of the principle that guide courts in the grant of an injunction ...
>
> [8] In a later passage McGarvie J summed up the two branches of the principle as follows:
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> > The first branch applies to cases where the petitioner is incapable of success as a matter of law or through absence of supporting evidence. Where the petitioner is not entitled to present a petition or where the ground alleged is not a ground which can found a winding-up order, the petition is incapable of success as a matter of law, If there is no sufficient evidence to establish an otherwise sufficient ground, the petition is incapable of success for that reason. Thus the first branch applies where the proposed petition cannot succeed.
> >
> > The second branch applies to cases where there is a more suitable alternative means of resolving the dispute involved in a disputed claim against the company. They are not necessarily

A cases in which, as a matter of law or through absence of evidence, there is an inherent incapacity of success. They may be cases where the petitioner is entitled to present the petition, the ground is sufficient in law and there is evidence to support the ground. They are cases, though, where, due to the availability of the more suitable alternative remedy, the court B hearing the petition would in the circumstances, in the exercise of its discretion, decline to make a winding-up order, at least while the circumstances remain as they are at the time of the application for an injunction. Thus the second branch applies where, because of the availability of a suitable alternative C procedure, the petition is unlikely to succeed in the circumstances existing at the time.

(iii) *Pacific & Orient Insurance Co Bhd v. Muniammah Muniandy* [2011] 1 CLJ 947; [2010] MLJU 2217, the Court of Appeal in referring to the *Fortuna* and *Mobikom* cases explained the application of the two branches as D follows:

[26] The first principle laid down in that case in that an injunction of that nature may be granted by court where the presentation of the petition might produce irreparable damage to the company and where the proposed petition has no chance of success. In order to succeed in getting injunction under this principle, the applicant E must satisfy both limbs of the principle *ie*:

(i) the intended petition has no chance of success, as a matter of law as well as a matter of fact; and

(ii) the presentation of such petition (which has no chance of success) might produce irreparable damage to the company. F

(see: *Re A Company* [1894] 1 Ch 349; *Charles Forte Investment Ltd v. Amanda* [1964] 1 Ch 240; [1963] 2 All ER 940; and *Bryanston Finance Ltd v. De Vries (No 2)* [1976] 2 WLR 41; [1976] 1 All ER 25)

[27] This principle is not applicable to the present case. The G respondent herein had obtained a valid and enforceable judgment against the insured as well as the insurer (appellant). The intended petition if filed is not bound to fail. He has a good chance to succeed. Therefore whether or not it causes irreparable damage is of no consequence. Thus the injunction applied for by the appellant in the present case, cannot be granted by court under this H principle.

[28] The second principle established in the *Fortuna* case is that an injunction of that nature may be granted in cases where a petitioner proposing to present a petition has chosen to assert a disputed claim, by a procedure which might produce irreparable damage to the company, rather than by a suitable alternative I procedure.

> [29] This principle applies only to disputed debt. It does not apply to cases where the debt in question is undisputed. As long as the debt cannot be disputed, it is not consequence whether or not it will cause irreparable damage to the company, if presented. A valid and enforceable judgment of court as in the present case, (unless set aside or stayed) cannot be considered a disputed debt. The law is settled on this point. Therefore, an order for injunction as prayed for by the appellant in the present case, also cannot be granted under this principle.

[18] The Court of Appeal in *Tan Kok Tong v. Hoe Hong Trading Co Sdn Bhd* [2007] 2 CLJ 305; [2007] 4 MLJ 355 made clear that in considering a *Fortuna* injunction, the principle in *American Cynamid Co v. Ethicon Ltd* [1975] AC 396 does not apply:

> [8] When deciding whether to grant an injunction to restrain a petition that is based on a statutory demand for a debt, the court must be satisfied that the debt is *bona fide* disputed on substantial grounds (see *Stonegate Securities Ltd v. Gregory* [1980] 1 All ER 241). It is not enough that there is a serious question to be tried. In other words, this is one of those cases to which the general test laid down in *American Cynamid Co v. Ethicon Ltd* [1975] AC 396 does not apply. In *Molop Corp Sdn Bhd v. Uniperkasa (M) Sdn Bhd* [2003] 6 MLJ 311, Low Hop Bing J (as he then was) correctly held as follows (at p. 321):
>
> > In *Natseven TV Sdn Bhd v. Television New Zealand Ltd* [2001] 4 CLJ 722, I had the occasion to consider and determine the burden of proof cast on the plaintiff in an application for interlocutory injunction to restrain the presentation of a winding-up petition, in the following words:
> >
> > > I agree with the reasons given by the English and New Zealand Court of Appeal respectively and by Abdul Malik J and hold that for the purpose of obtaining an interim injunction to restrain the defendant from proceeding with the winding-up petition, the burden of proof cast on the plaintiff is only discharged by reference to the standard of proof or test in adducing evidence to establish a *prima facie* case and that the principle relating to the test of 'serious question to be tried' in *American Cynamid Co v. Ethicon Ltd* [1975] AC 396; [1975] 1 All ER 504 as applied in *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193 is not applicable as the applications there were not applications to restrain winding-up petitions or proceedings, such as in the instant case before me.
> >
> > > Illustration of a *prima facie* case may be provided by necessary evidence that there is a *bona fide* dispute by the plaintiff in relation to the statutory demand or that the plaintiff is solvent.

[19] The issues before this court in the OS are:

(i) whether the s. 466 statutory notice is valid; and

(ii) whether there is a *bona fide* dispute of the debt justifying the *Fortuna* injunction.

Whether The Section 466 Statutory Notice Is Valid

[20] In this case, it is common ground that there is no judgment on the debt. The fact that there is no judgment in my view does not translate to a dispute on the debt for reasons as follows.

[21] Section 466 of the CA 2016 provides for when a company may be deemed 'unable to pay its debts'. The relevant parts read:

> 466 Definition of 'inability to pay debts'
>
> (1) A company shall be deemed to be unable to pay its debts if:
>
> (a) the company is indebted in a sum exceeding the amount as may be prescribed by the Minister and a creditor by assignment or otherwise has **served a notice of demand**, by himself or his agent, requiring the company to pay the sum due by leaving the notice at the registered office of the company, and **the company has for twenty-one days after the service of the demand neglected to pay the sum** or to secure or compound for it to the satisfaction of the creditor;
>
> (b) **execution** or other process issued on **a judgment, decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part**, or
>
> (c) it is proved to the satisfaction of the court that the company is unable to pay its debts and in determining whether a company is unable to pay its debts the court shall take into account the contingent and prospective liabilities of the company.
>
> (emphasis added)

[22] To my knowledge, there are at least four Court of Appeal cases which made clear that for the purposes of s. 466(1)(a), there is no necessity for a creditor to obtain a judgment before serving a statutory demand:

(i) in *Maril-Rionebel (M) Sdn Bhd & Anor v. Perdana Merchant Bankers Bhd & Other Appeals* [2001] 3 CLJ 248; [2001] 4 MLJ 187, Gopal Sri Ram JCA (as he then was) explained as follows:

> But a petition for winding-up is not execution. For a winding-up petition is not based upon any judgment of a court. *Normally, it is based on the inability of a company to pay its debts as and when they fall due. Such inability is normally evidenced by the company's inability to satisfy or compound a notice of demand issued pursuant to s. 218 of the Companies Act*. But the issuance of such a notice is not a *sine qua non* for the presentation of a winding-up petition. *What is needed is compelling evidence of the company's inability to pay its debts as and when they fall due*.
>
> (emphasis added)

(ii) in *Syarikat Mohd Noor Yusof Sdn Bhd v. Polibina Engineering Enterprise Sdn Bhd* [2005] 2 CLJ 676; [2006] 1 MLJ 446, Mohd Ghazali Yusoff JCA stated:

> We are aware that it is not provided under the Act that a petitioner must be armed with a judgment debt prior to the filing of a petition to wind up a company ... .

(iii) in *Megasteel Sdn Bhd v. Perwaja Steel Sdn Bhd* [2008] 4 CLJ 352, Gopal Sri Ram JCA (as he then was) held as follows:

> A creditor, generally speaking, does not have to obtain judgment before instituting winding-up proceedings against a company. That is the purpose for which s. 218(2)(a) of the Companies Act, 1950 was enacted.

(iv) in *Lafarge Concrete (Malaysia) Sdn Bhd v. Gold Trend Builders Sdn Bhd* [2011] 1 LNS 1763; [2012] 6 MLJ 817, Jeffrey Tan JCA pronounced:

> [6] Before we proceed to answer those questions, we should perhaps say that '**a creditor is not required to obtain a judgment before serving a statutory demand** ...' (*The Law of Company Liquidation* (4th Ed), by Andrew R Keay at p. 83) and 'whether or not judgment had been obtained, an unpaid creditor is, as a general rule, entitled to a winding-up order against a company which is insolvent' (*The Law of Company Liquidation* (4th Ed), by Andrew R Keay at p 91). Where there is no judgment, it is not uncommon for companies to argue that the debt is disputed. But 'in order to oppose a winding-up petition, the respondent must raise a *bona fide* dispute in both a subjective and objective sense. It must be honestly believed to exist and must be based on substantial or reasonable grounds – *BMC Construction Sdn Bhd v. Dataran Rentas Sdn Bhd* [2001] 1 MLJ 356' (Chan & Koh on *Malaysian Company Law* (2nd Ed), at para 22.145).
>
> (emphasis added)

[23] In this case, the statutory notice at exh. P-22 was issued in writing under the hands of the solicitors for the defendants, specified the amount of RM1,120,000 due and served at the registered office of the plaintiff as evident from the company search at exh. P-1. As such, I am of the view that the notice has complied with s. 466(1)(a) and is valid and effective as it has satisfied the three requirements laid out by the Federal Court in *Lai Yak Kee v. Pembinaan Alam Cemerlang Sdn Bhd* [2012] 1 LNS 1464 as follows:

> For the demand to be effective it must comply with the prescribed requirements of the sub-section and these are as follows:
>
> (1) The demand Must be in writing under the hand of the creditor or his authorised agent;
>
> (2) It must specify the sum due;

(3) The demand must be served on the company by leaving it at its registered office.

Is There A *Bona Fide* Dispute Of Debt?

[24] The primary question for determination in this regard is whether the amount as claimed by the defendants in the notice can be considered as *bona fide* disputed on substantial or reasonable grounds, as contended by the plaintiff.

[25] In my assessment of the parties' affidavits, I have considered the approach of the Federal Court in *Lori Malaysia Bhd v. Arab-Malaysian Finance Bhd* [1999] 2 CLJ 997; [1999] 3 MLJ 81 at pp. 1005 to 1006 (CLJ) per Edgar Joseph Jr FCJ:

> The Law on the approach of the court of first instance in evaluating and resolving a conflict of evidence on affidavit was well captured by the Privy Council in *Eng Mee Yong v. Letchumanan* [1979] 2 MLJ 212 and in *Tay Bok Choon v. Tahansan Bhd.* [1987] 1 MLJ 433.
>
> In the first of these cases – *Eng Mee Yong* – Lord Diplock delivering the advice of their Lordships of the Board said this (at p. 381 D):
>
> > Although in the normal way it is not appropriate for a judge to attempt to resolve conflict of evidence on affidavit, this does not mean that he is bound to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit **however equivocal, lacking in precision, inconsistent with undisputed contemporary document or other statements by the same deponent, or inherently improbable itself may be**.
>
> In the second of these cases – *Tahansan* – Lord Templeman put the point more shortly and generally, thus:
>
> > If allegations are made in affidavits by the petitioner and those allegations are **credibly denied** by the respondent's affidavits, then in the absence of oral evidence or cross examination, the judge must ignore the disputed allegation.
>
> (emphasis added)

[26] Where the affidavit evidence disclosed a dispute of facts particularly on the mutual understanding, such facts must be analysed and if they are found to be inconsistent with undisputed contemporary documents or inherently improbable in themselves, this court is entitled to reject those facts and proceed upon the undisputed contemporaneous documentary evidence.

[27] In relation to the plaintiff's contention that the sum claimed failed to take into account the fact that by convention, agreement and/or mutual understanding between the plaintiff and the defendants, the defendants will give a reduction of monthly rentals of RM10,000 *en bloc* every six months, I find such assertion do not hold water. In my respectful view, if the postulated mutual understanding existed between the parties, it is most

curious for the plaintiff to issue its letter dated 28 December 2020 at exh. P-9 to the defendants to seek for the latter's consideration to reduce the rental sum from January 2021 onwards to RM70,000 and further proposed to revise the said agreement allegedly due to the plaintiff's change of shareholders at the material time. This posited mutual understanding is further contradicted by the plaintiff's own letter of 26 March 2021 which states that there was a mutual understanding agreed in or about the month of July 2020, where the defendants agreed to maintain the monthly rental at RM110,000 from November 2020 to November 2021! If this understanding in July 2020 exists, there is firstly no basis for the letter of 28 December 2020; secondly, no basis also for the plaintiff to pay rent of RM80,000 per month for the months of January to April 2021.

[28] I also find the mutual understanding asserted by the plaintiff to be inherently improbable and totally inconsistent with the undisputed terms of the TA in cl. 10 which provides for any variation to be in writing. The rent for the applicable period is RM120,000 per month. I find that the contemporaneous documents and undisputed facts in relation to the agreed rental underscore the inherent implausibility of the plaintiff's bare contentions. Indeed the importance and superiority of contemporaneous documents cannot be overemphasised as made clear by the Federal Court in *Tindok Besar Estate Sdn Bhd v. Tinjar Co* [1979] 1 LNS 119; [1979] 2 MLJ 229. In law, parties are bound by the terms of the contract they have entered into and it is axiomatic that the duty of the court is to give effect to the clear intention of the parties as expressed in cl. 10, which is in clear and unambiguous language. See *eg. Setapak Heights Development Sdn Bhd v. Tekno Kota Sdn Bhd* [2006] 2 CLJ 337 CA at [27]; *Dato' Sivananthan Shanmugam v. Artisan Fokus Sdn Bhd* [2015] 2 CLJ 1062; [2016] 3 MLJ 122 CA at [31], *Michael C Solle v. United Malayan Banking Corp Bhd* [1984] 1 CLJ 151; [1984] 1 CLJ (Rep) 267; [1986] 1 MLJ 45. Any agreed reduction in rental were indeed in the past, expressly agreed by the defendants in writing. I do not find on the material before the court anything at all that would admit of such mutual understanding as posited by the plaintiff.

[29] As such, I find that the plaintiff in attempting to unilaterally foist the "mutual understanding" onto the defendants to justify a reduction of rentals and pay rent at RM80,000 a month from January 2021 is akin to the plaintiff attempting to re-write the terms of the TA. This court is entitled to reject the plaintiff's assertion that there was such mutual understanding. They are mere averments which are not substantiated by any cogent evidence, and thus, are not based on substantive grounds.

[30] The plaintiff has sought reliance on s. 7 of the COVID-19 Act to renegotiate the terms of the TA. However, in my respectful view, the COVID-19 pandemic do not excuse the plaintiff from not paying any rent at all from May 2021:

A (i) the plaintiff has not shown satisfactorily that it was unable to perform its contractual obligations under the TA; and that such inability was due to the measures prescribed, made or taken under the Prevention and Control of Infectious Diseases Act 1988 to control or prevent the spread of COVID-19;

B (ii) the plaintiff did not seem to be affected due to the measures implemented by the Government since 18 March 2020 as department/ convenience stores being an essential service and goods provider were allowed to open;

C (iii) in addition, the plaintiff's own financial statement of comprehensive income at p. 281 of encl. 2 shows that for the financial year end 2020, revenue and gross profit had improved in 2020 as compared to 2019 with revenue defined at note 15 as derived from sale of consumer goods. Further, the explanation at note 20 at p. 298, encl. 2 made clear that the impact of the COVID-19 pandemic on the company's performance D could not be reasonably ascertained at time the financial statements were authorised for issuance;

(iv) here, it is imperative to also note that, even though the plaintiff affirmed on oath at para. 12 of encl. 2 that it was willing to pay rental at RM80,000 a month from May to December 2021, yet it did not pay a E cent up to date of this court's decision; the inequitable conduct of the plaintiff is all the more egregious particularly when the plaintiff has submitted that it has "set apart sufficient balance to make payments to the defendants";

F (v) with utmost respect, refusal to pay in my view does not equate to inability to pay, pure and simple; and

(vi) as such, the plaintiff cannot willy-nilly avail itself of s. 7 of the COVID-19 Act not to pay rental as s. 7 does not confer a moratorium on the plaintiff's obligations to pay rent.

G **[31]** The plaintiff's contention that in fact, part of the sum claimed by the defendants was the subject matter of suit 548 which was withdrawn by the defendants does not add to the plaintiff's case one whit – firstly, as alluded earlier, there is no necessity to have a judgment before a s. 466 notice is sent; secondly, the suit was not decided on merits and withdrawn with liberty to H file afresh.

[32] As for the assertion that the plaintiff is a going concern and is solvent, it is this court's judgment that the plaintiff must at present have the ability to pay the amount claimed by the defendants to be due and owing to the defendants, and failure to pay up within 21 days will invoke the presumption I of being 'unable to pay its debts' pursuant to s. 466(1) of the CA 2016.

[33] Even if the plaintiff is solvent as alleged, its refusal to pay, cannot give it any basis or right to a *Fortuna* injunction. Solvency does not give one *carte blanche* to refuse to pay legitimate debts. Case laws make clear that the test of commercial solvency required immediate availability of assets to pay current liabilities when they fall due. In *Pengkalen Holiday Resort Sdn Bhd v. Perbadanan Pengurusan Paradise Lagoon Apartment (North) & Anor* [2016] 1 LNS 1114 and *Klass Corporation (M) Sdn Bhd v. MKRS Management Sdn Bhd* [2018] 7 CLJ 303; [2018] 9 MLJ 305, Mohd Nazlan J (as His Lordship then was) observed that the solvency of a company would count for nothing if it persists in non-payment or that it is nevertheless not ready, willing and able to meet the demand of the petitioning creditor.

[34] By Federal Government *Gazette* Notification No. 4159 dated 22 March 2021, the amount of indebtedness required to commence winding-up proceedings under s. 466(1)(a) was increased from RM10,000 to RM50,000 with effect from 1 April 2021. Even assuming that I am wrong that there is the alleged "mutual understanding", and RM80,000 per month was the agreed rent, mere disagreement on the quantum of indebtedness cannot deny the defendants' statutory right as a creditor to present a petition. Even taking the plaintiff's case at the highest that rent per month is RM80,000, a single month's rent owed in the instant case, would put the debt above the statutory minimum under s. 466(1)(a); let alone the stark fact that the plaintiff has not paid rent since May 2021. The Federal Court in the case of *Malaysia Air Charter Company Sdn Bhd v. Petronas Dagangan Sdn Bhd* [2000] 4 CLJ 437; [2000] 4 MLJ 657 has ruled that a notice of demand under s. 218(2)(a) of the Companies Act 1965 (CA 1965) need not specify the exact sum due as at the date of the demand since for so long as the sum due exceeds RM500 and remains unpaid, after a demand has been made, without a reasonable explanation to the satisfaction of the court, there is "neglect" to pay such sum within the meaning of the said section.

[35] Although the *Malaysia Air Charter Company* case was decided under s. 218(2)(a) Companies Act 1965 where the threshold sum was only RM500, I see no reason why the principles therein cannot apply to the new threshold sum of RM50,000 in the instant case. In my opinion, the defendants can still be described as 'creditors'; and being unpaid creditors, they have both *locus standi* and a statutory right to petition, and the petition is not bound to fail as the failure to pay within the stipulated period of 21 days gave rise to the presumption that the plaintiff is unable to pay its debts. I find the intended winding-up petition cannot be described properly as an abuse of process of the court even based on the plaintiff's self-reckoning of RM80,000 a month's rent (assuming this has any basis at all), as it is only the quantum of the debt that is in dispute.

[36] Further, at the material time, the defendants' letters dated 16 February 2021; undated letter by the defendants' former solicitors to the plaintiff (exh. P-11), letters dated 12 April 2021 and 10 May 2021 were not denied or challenged by the plaintiff on the amount due. In a business relationship,

the failure of a party to register any protest or deny the opposing party's assertion or demand amounts to an implied admission. See: *David Wong Hon Leong v. Noorazman Adnan* [1995] 4 CLJ 155; [1995] 3 MLJ 283 CA at pp. 288 to 289 which was affirmed by the Federal Court in *Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd* [2015] 2 CLJ 453; [2015] 2 MLJ 441 [FC] at p. 478:

> ... It is the ordinary nature of businessman to immediately refute any proposition injurious to him contained in letters and not to let it stand (see *David Wong Hon Leong v. Noorazman Adnan* [1995] 4 CLJ 155).

[37] With utmost respect, I am of the view that the plaintiff's claim of irreparable damage, fears and hardship alluded earlier, cannot override the defendants' statutory right as a creditor to enforce the debt owed, much less constitute any real ground for a *Fortuna* injunction. The Court of Appeal in *Pacific & Orient Insurance Co Bhd v. Muniammah Muniandy* (*supra*) at [29] made plain that if the intended petition is not bound to fail and instead has a good chance of success, then whether or not the petition will cause irreparable damage is immaterial and of no consequence. The plaintiff's fears can all be addressed by paying up – see *Ming Ann Holdings Sdn Bhd v. Danaharta Urus Sdn Bhd* [2002] 3 CLJ 380; [2002] 3 MLJ 49:

> On the facts, the grounds relied on by the applicant are nothing more than 'fear of losing'; fear of losing business, fear of losing customers, fear of losing suppliers, fear of losing goodwill, fear of not being able to collect its dents from third parties, in case the applicant company is wound up. All that the applicant has to do to avoid such 'fears' is to settle the judgment debt.

[38] On the evidence placed before this court, the plaintiff has not satisfied the court on a balance of probabilities that the defendants' intended petition has no chance of success, as a matter of law as well as a matter of fact; and that the presentation of such petition (which has no chance of success) might produce irreparable damage to the plaintiff. In other words, the plaintiff has not satisfied the two principles laid down in the *Fortuna Holdings* case (*supra*) to warrant a grant of an injunction to prevent the defendants from presenting a winding-up petition against the plaintiff.

[39] For reasons given, I find there is no merit in the plaintiff's application. The OS is dismissed with costs. Enclosure 3 is struck off as it is rendered academic.

***Erinford* Injunction (Enclosure 33)**

[40] Enclosure 33 is the plaintiff's application for an *Erinford* injunction to restrain the defendants from filing, presenting a winding-up petition and taking further steps in the winding-up petition pending the hearing of the plaintiff's appeal to the Court of Appeal against the decision made by this court on 25 March 2022 in dismissing the plaintiff's application for an injunction to restrain the defendants from filing a winding-up petition against the plaintiff.

[41] I am mindful that the main consideration in an application for an *Erinford* injunction is the nugatoriness or otherwise of the appeal. The courts have anyhow extended these considerations to include the balance of convenience, and hence the discretion vested in the court to consider and compare the effect of granting or refusing an *Erinford* injunction and maintaining the *status quo* pending the appeal.

[42] Whether it is just and equitable to issue an *Erinford* injunction in a given fact pattern must vary from case to case.

[43] The jurisdiction of this court had been neatly encapsulated by Nik Hashim FCJ in the Federal Court case of *Subashini Rajasingam v. Saravanan Thangathoray & Other Appeals* [2008] 2 CLJ 1, in adopting the following passage of Megarry J in the *Erinford* case:

> ... where the application is for an injunction pending an appeal, the question is whether the judgment that has been given is one on which the successful party ought to be free to act despite the pendency of an appeal. One of the important factors in making such a decision, of course, is the possibility that the judgment may be reversed or varied. Judges must decide cases even if they are hesitant in their conclusions; and at the other extreme a judge may be very clear in his conclusions and yet on appeal be held to be wrong. *No human being is infallible*, and for none are there more public and authoritative explanations of their errors than for judges. *A judge who feels no doubt in dismissing a claim to an interlocutory injunction may, perfectly consistently with his decision, recognise that his decision might be reversed, and that the comparative effects of granting or refusing an injunction pending an appeal are such that it would be right to preserve the status quo pending the appeal* ...
>
> (emphasis added)

[44] In considering the comparative effects of my decision in this application, the factor that has to be considered is the prejudice that the plaintiff would suffer if the application was not allowed and the position of the defendants in allowing the application.

[45] The application is predicated on similar grounds as advanced for the *Fortuna* injunction. I found the application for an *Erinford* injunction to be bereft of merit for the same reasons why the *Fortuna* injunction application was dismissed. My additional reasons are:

(i) the plaintiff should not be allowed to take advantage of a situation brought about by its own omission to pay rentals;

(ii) the plaintiff's reliance on *Jaks Sdn Bhd v. Zeta Letrik Sdn Bhd* [2021] 1 LNS 1505; [2021] MLJU 1825, a case decided by me where an *Erinford* injunction was granted to preserve the *status quo* pending an appeal is misconceived. In *Jaks*' case, the winding-up petition was not filed yet. In the instant case, the *Fortuna* injunction application in respect

of the original relief sought had been superseded by subsequent events *viz* the advertisement and *Gazette* of the petition, and thus rendered academic;

(iii) whilst the Court of Appeal had on 7 August 2006 in the *Mobikom* case (*supra*) stated that a *Fortuna* injunction may be granted after the presentation of a winding-up petition (such decision was followed by Lau Bee Lan J (later JCA) in *Volkswagen Group Malaysia Sdn Bhd v. Loo Chay Meng* [2016] 10 CLJ 748; [2016] 9 MLJ 191), however a year later on 26 October 2007, the Court of Appeal in *People Realty Sdn Bhd v. Red Rock Construction Sdn Bhd* [2008] 1 CLJ 632; [2008] 1 MLJ 453 in following *Azman & Tay Associates Sdn Bhd v. Sentul Raya Sdn Bhd* [2002] 4 CLJ 391; [2002] 4 MLJ 390 held that once a winding-up petition is filed, the court is precluded from granting an injunction against advertisement or gazettal of the petition:

> [11] With regard to the appellant's contention that die (*sic*) High Court has powers under s. 221 of the Act, r. 193 of the Rules and under its inherent jurisdiction to restrain the advertisement of the petition, we hold that the contention has no merit s. 221 clearly provides for powers of court 'on hearing a winding-up petition' and not before the hearing of the petition and whereas r. 193 provides for enlargement or abridgment of time which clearly has no relevance to the issue before us. The request for invocation of inherent powers of the court is misplaced – r. 24 of the Rules clearly governs this case and prescribes a requirement of advertisement of petition upon it being filed. By its terms, the requirement is mandatory; and surely the court cannot disregard the provision and act outside it.
>
> [12] In our judgment, once a winding-up petition is filed, the court is precluded from granting an injunction against advertisement or gazettal of the petition. In this regard, we agree with Vincent Ng J (later JCA) in *Azman & Tay Associates Sdn Bhd v. Sentul Raya Sdn Bnd* [2002] 4 MLJ 390 at p. 396 where he said:
>
> > I would hold that the court is not empowered to make any order to restrain or injunct the petitioners from carrying out their statutory obligation to comply with r. 24.

(iv) to meet the point that a *Fortuna* injunction do not avail an applicant once the winding-up petition has been presented, the plaintiff has cited *Maju Holdings Sdn Bhd v. Spring Energy Sdn Bhd* [2020] 1 LNS 1332; [2021] 8 MLJ 275 where the injunction was granted. I find the case easily distinguishable as the plaintiff in that case had established to the satisfaction of the court through its affidavit filed and the exhibits thereto that its cross-claim or counterclaim is based on substantive grounds and that it is in excess of the amount stated in in the statutory notice. In the instant case, there is no cross-claim. Further Ong Chee Kwan JC (as His

Lordship then was) concluded clearly that once the winding-up petition is presented, the injunction should be made in the winding-up court save in rare and exceptional circumstances:

> [59] I have in *Permata Trans Offshore Sdn Bhd v. New Wing Energy Sdn Bhd* [2019] MLJU 922 held that where winding-up proceedings have commenced before the winding-up court, an application to restrain such winding-up proceedings should be made before the winding-up court, save in rare and exceptional cases where irreparable harm would be suffered by the company.

(v) *sans* exceptional circumstances shown by the plaintiff in the instant case, added by the principles in the *People Realty Sdn Bhd* case (*supra*) which I choose to follow instead of *Mobikom*, in my utmost respectful view, considering all the circumstances, the more appropriate course would be for the plaintiff to apply to the winding-up court for a stay or to strike out the proceedings for abuse of process since the plaintiff is of the adamant view that the debt is *bona fide* disputed. The *Erinford* injunction now in my opinion is not necessary when suitable statutory remedy is available, pursuant to s. 469 of the CA 2016 (previously s. 221 of the CA, 1965);

(vi) the plaintiff had also urged upon this court to also consider that the defendants had issued a writ of distress resulting in the premises being sealed on 12 May 2022 (a day before the hearing of encl. 33). This development in my respectful view does not add to the plaintiff's case as whether the writ of distress was legally issued is within the remit of the court which issued the writ to decide;

(vii) it is settled law that a court will not act in vain. Having found earlier that the matter has been rendered academic, this court as such, sees no useful purpose to grant an *Erinford* injunction that is of no utility. As such, the questions of nugatoriness of the appeal, balance of convenience and damages not being an adequate remedy posited by the plaintiff do not arise for consideration at all. In case I am wrong, the balance of convenience is in favour of the defendants, for if the *Erinford* injunction is allowed on the set of facts available here, the defendants will be hindered from pursuing their lawful statutory rights as a creditor of the plaintiff.

[46] As such, I have no difficulty in exercising the discretion to refuse the *Erinford* injunction application. Accordingly, I dismissed encl. 33 with costs.